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In the Supreme Court of the United States
OCTOBER TERM, 1990

LEAH LIZA MARKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the criminal and civil forfeiture provisions of 21 U.S.C. 853 and 881(a)(7) allow the United States to succeed to the interest of petitioner's former husband in property held by petitioner and her former husband as tenants by the entireties.



TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	12

TABLE OF AUTHORITIES

Cases:

<i>Clearfield Trust Co. v. United States</i> , 318 U.S. 363 (1943)	5
<i>United States v. Monsanto</i> , 109 S. Ct. 2662 (1989) ..	9
<i>United States v. One Single Family Residence</i> , 894 F.2d 1511 (11th Cir. 1990)	10, 11

Statutes:

21 U.S.C. 841 (a)	2
21 U.S.C. 846	2
21 U.S.C. 853	3, 5, 9
21 U.S.C. 853 (a)	8, 9
21 U.S.C. 853 (a) (2)	2
21 U.S.C. 853 (c)	8-9
21 U.S.C. 853 (n)	10
21 U.S.C. 853 (n) (2)	3
21 U.S.C. 853 (n) (6) (A)	3, 5
21 U.S.C. 881 (a) (7)	2, 3, 4, 5, 9, 10

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A57) is reported at 910 F.2d 343. The orders of the district court (Pet. App. A58-A74) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1990, and a petition for rehearing was denied on October 11, 1990. Pet. App. A75-A76. The petition for a writ of certiorari was filed on January 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. On February 26, 1987, petitioner's former husband, Mitchell Dennis Marks, was indicted in the Eastern District of Michigan for conspiracy to possess cocaine with intent to distribute it between December 15 and 17, 1985, in violation of 21 U.S.C. 846, and for possession with intent to distribute cocaine on December 15, 1985, in violation of 21 U.S.C. 841(a). The indictment also contained a forfeiture count pursuant to 21 U.S.C. 853(a)(2), which alleged that Mr. Marks had an interest in real property located at 2525 Leroy Lane, West Bloomfield, Michigan, that he used or intended to use to commit or facilitate the commission of his drug offenses. Mr. Marks was convicted of the drug offenses, and the jury found that he had used or intended to use the Leroy Lane property to facilitate those offenses. On June 6, 1988, he was sentenced to concurrent terms of four years' imprisonment for the conspiracy and substantive drug offenses, to be followed by a three-year term of special parole on the substantive offense. The judgment also declared his interest in the property forfeited to the United States. Pet. App. A2-A3, A58-A59.

On July 15, 1988, petitioner—who was then married to Mr. Marks—filed a petition in the criminal case for a determination of her interest in the real property. In the interim, on April 17, 1987, the Government filed an *in rem* complaint under 21 U.S.C. 881(a)(7) seeking civil forfeiture of the same property. On May 8, 1987, petitioner filed an answer to the civil complaint, and on May 15 she filed a claim of interest in the property in that case as well. The civil and criminal proceedings were consolidated. Pet. App. A3-A4, A59.

b. The criminal forfeiture provisions of 21 U.S.C. 853 provide in relevant part:

(a) Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

* * * * *

(2) any of the person's property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of, such violation * * * .

Where an order of criminal forfeiture has been entered under Section 853, a third party asserting a legal interest in the property, such as petitioner, may petition the court for a hearing to adjudicate her interest. 21 U.S.C. 853(n)(2). The court then must amend the order of forfeiture under 21 U.S.C. 853(n)(6)(A) if the third-party petitioner establishes by a preponderance of the evidence that she—

has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant * * * at the time of the commission of the acts which gave rise to the forfeiture of the property * * *

The relevant section of the civil forfeiture statute, 21 U.S.C. 881(a)(7), provides for forfeiture to the United States of “[a]ll real property, including any right, title, and interest * * * in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the com-

mission of," a drug felony. Section 881(a)(7) further provides, however, that—

no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

c. In the consolidated proceedings before the district court, the parties stipulated that the Leroy Lane property was owned at the time of the offenses by Mitchell Marks and petitioner, then husband and wife, as tenants by the entirety, and that petitioner was innocent of any knowledge of Mr. Marks' illegal activities on the premises. By an agreement of the parties dated April 29, 1988, the property was sold and the net proceeds were deposited with the United States Marshal. The district court deemed the proceeds to be a substitute *res* having the same attributes as the real property for purposes of these forfeiture proceedings. Pet. App. A4, A50 & n.1.¹

By orders dated November 7 and 22, 1988, the district court entered judgment for petitioner in the civil forfeiture case and modified the order of forfeiture in petitioner's favor in the criminal case. Pet. App. A58-A74. The court awarded petitioner the entire proceeds of the sale of the Leroy Lane property, holding that no part of the property could be

¹ The couple purchased the property under a land contract on November 20, 1975. When they failed to make timely payments, the mortgagor successfully brought foreclosure proceedings and the property was sold on December 2, 1983, pursuant to a sheriff's deed. After expiration of the redemption period, the couple repurchased the property in June 1984. The couple then defaulted on the second land contract, and a second judgment of foreclosure was entered against them in state court on February 16, 1988. Pet. App. A60-A61.

forfeited to the United States. The court reasoned that because petitioner had a legal interest in the property that is “the equivalent of an undivided life estate in the entire property” and that “cannot cease to exist because of her husband’s actions,” she “rather than” her husband had an interest in the entire property within the meaning of Section 853(n)(6)(A). Pet. App. A66. On this basis, the court held that the entire property, including Mr. Marks’ interest, was insulated from criminal forfeiture to the United States. *Id.* at A66-A67, A69, A74. For similar reasons, the court held that the entire property was insulated from civil forfeiture under the “innocent owner” exception in 21 U.S.C. 881(a)(7). Pet. A70-A71, A73-A74.

4. a. The United States appealed, and the court of appeals vacated and remanded. Pet. App. A1-A57. The government argued that where, as here, property is held as tenants by the entireties and the interest of one spouse is subject to forfeiture under 21 U.S.C. 853 or 881(a)(7), the government is immediately entitled to realize a one-half interest in the property. Relying on *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), the government urged that a federal common law rule be developed to effectuate the purposes of the federal forfeiture statutes in such circumstances. That federal common law rule would supersede the tenancy by the entireties (under which each spouse has an undivided interest in the entire property with a right of survivorship and neither spouse can alienate his or her interest) and would effectively transform the estate into a tenancy in common between the innocent spouse and the United States (as successor to the interest of the spouse who committed the offense). The United States then would be entitled to obtain an immediate partition or

sale of the property and to receive one-half of the proceeds, and the innocent spouse would not have a right of survivorship if the offending spouse died first.

The court of appeals rejected the government's contention, concluding that the text and purposes of the federal forfeiture statutes do not require displacement of state property law. Pet. App. A11-A28. The court reasoned that "[p]roperty interests have long been acquired and defined by state law," and that "it was with those interests in mind that Congress drafted provisions for the protection of innocent third parties." *Id.* at A17-A18. In this case, the court believed, "[t]o sever the entireties estate in favor of a tenancy in common among [petitioner] and the Government would not merely prevent a windfall to [petitioner], * * * but would vest the Government with a greater interest than that held by the individual wrongdoer whose interest the Government has acquired and would not adequately compensate [petitioner] for her survivorship interest." *Id.* at A28. The court therefore held that petitioner retained her interest in the tenancy by the entireties as it existed under state law when her husband committed the acts giving rise to forfeiture under federal law. *Id.* at A22, A28.

At the same time, however, the court disagreed with the district court's conclusions that petitioner's interest in the property prevented forfeiture to the United States of her husband's corresponding interest, and that the entire property vested in petitioner by reason of the forfeiture. Pet. App. A28-A39. Instead, the court held that the United States succeeded under the federal forfeiture statutes to Mr. Marks' interest in the property, but that forfeiture did not defeat petitioner's right to enjoy the essential attributes of the interest she retained. As a result, the

court explained, the government is precluded from actually realizing Mr. Marks' interest in the property "unless and until [petitioner] predeceases her husband or the entirety estate is otherwise terminated by dissolution of the marriage or joint conveyance." *Id.* at A31.

The court of appeals remanded the case to allow the district court to accommodate the respective interests of petitioner and the United States under the principles it announced. Pet. App. A32, A35, A38. It observed that if the Leroy Lane property had not been sold, petitioner would have been entitled to live in the house for the duration of the tenancy by the entirety, "since the estate is founded on marital union, and the government obviously cannot assume the role of spouse to [petitioner]." *Id.* at A31-A32. Rather, the Government would have had a lien on the property to the extent of Mr. Marks' interest, to prevent petitioner from obtaining the entire proceeds if the property was sold. *Id.* at A32. But because the real property here had been sold, the district court would have to determine on remand how to protect the government's interest in the fund while allowing petitioner to benefit from it, and to protect each party's right of survivorship in the event that either petitioner or Mr. Marks died. *Id.* at A32, A36-A37.²

3. The government informed the court of appeals in response to petitioner's petition for rehearing and suggestion of rehearing en banc (at 2 n.1) that petitioner's counsel had notified the government that pe-

² Judge Krupansky dissented from the majority's holding that the government is not entitled to realize its interest in the property immediately, under a federal common law rule. Pet. App. A39-A57.

titioner and Mitchell Marks are now divorced, thereby terminating the tenancy by the entirety under Michigan law.

ARGUMENT

1. The court of appeals rejected the government's contention that, by operation of a federal common law rule derived from the purposes of the forfeiture statutes, the tenancy by the entirety under state law was dissolved upon Mr. Marks' commission of the acts giving rise to forfeiture of the property, and that the United States therefore was entitled to immediate satisfaction of its interest in the property. Instead, the court held that the United States succeeded only to whatever interest Mr. Marks had in the property under state law, while preserving petitioner's corresponding interest—including the attributes of a tenancy by the entirety that would protect her continued enjoyment of the property and her right of survivorship. The United States has not sought review of that holding in this Court.

2. Not content with retaining whatever interest she previously had under state law, petitioner argues (Pet. 9-33) that her husband's interest in the property was also insulated from forfeiture to the United States—and, what is more, that her husband's interest became vested in *her* when he committed the drug offenses, as the district court held. The court of appeals correctly rejected that contention.

The criminal forfeiture statute states that “irrespective of any provision of State law,” a convicted defendant shall forfeit to the United States “any” of his property that was used to commit or facilitate commission of the drug offenses. 21 U.S.C. 853(a). Section 853(a) further states that the court “shall order” forfeiture of “all” such property, and 21

U.S.C. 853(c) states that “[a]ll right, title, and interest” in such property “vests in the United States upon commission of the act giving rise to forfeiture.” In holding in *United States v. Monsanto*, 109 S. Ct. 2662 (1989), that property the defendant wants to use to pay an attorney is not exempt from forfeiture under this provision, the Court observed that “Congress could not have chosen * * * broader words to define the scope of what was to be forfeited,” and that the concept of “property” for these purposes is “all-inclusive.” *Id.* at 2662. The same reasoning applies here. Nothing in the all-inclusive statutory text suggests that a defendant’s interest in property held as tenants by the entirety under state law is exempted from forfeiture. To the contrary, Section 853(a)’s mandate that property be forfeited “irrespective of any provision of State law” forecloses any argument that the particular features of a tenancy by the entirety under state law insulate such property from forfeiture.

The civil forfeiture statute, 21 U.S.C. 881(a)(7), is comparably all-inclusive in its scope, providing for forfeiture of “*all* real property” used to commit or facilitate a drug felony, specifically including “*any* right, title, and interest * * * in the whole of any lot or tract of land and *any* appurtenances or improvements” (emphasis added). Once again, there is no suggestion that real property (or any “interest” in real property) is exempt from forfeiture under federal law simply because it takes the form of a tenancy by the entirety under state law.

Nor is there any basis for petitioner’s even more improbable contention that the effect of Sections 853 and 881(a)(7) in the context of a tenancy by the entirety is not only to insulate the interest of the guilty spouse from forfeiture to the United States,

but also to transfer the guilty spouse's interest to the innocent spouse. That result would undermine the purposes of the federal forfeiture statutes. It also would conflict with petitioner's repeated contention (Pet. 10, 13, 16-18, 19-22, 25-29) that the federal forfeiture laws should be construed and applied in a manner that respects state law, since by vesting all interests in the innocent spouse, the entireties estate would be terminated in the same manner as if the guilty spouse had died. The third-party relief provisions in 21 U.S.C. 853(n) and 881(a)(7) do not support that outcome. Those provisions protect only whatever interest the innocent third-party claimant had prior to the forfeiture; they do not confer new interests on the claimant, in derogation of the rights vested in the United States upon the commission of the act giving rise to forfeiture.³

Contrary to petitioner's contention (Pet. 9, 12-16), there is no conflict between the Sixth Circuit's decision in this case and the Eleventh Circuit's decision in *United States v. One Single Family Residence*, 894 F.2d 1511 (1990), that warrants review by this

³ Petitioner argues (Pet. 21-22, 24-26) that under Michigan law, there is no legal form of "lien" or "lis pendens" comparable to the interest granted the government by the court of appeals. As we read the decision below, however, the court of appeals did not hold that the United States had actually obtained a "lien" or "lis pendens" that is either derived from state law or dependent upon the availability of a similar interest or mechanism under state law. The court used those terms by way of analogy, to explain that the interests of the United States would be fully protected while the property was held in a tenancy by the entireties. See Pet. App. A33-A37. Whatever characterization is used, the right of the United States to perfect the interest it has acquired by forfeiture, should the tenancy by the entireties be terminated in the future, derives from the federal forfeiture statutes themselves.

Court. The Eleventh Circuit, like the court below, held that the property interest of the innocent spouse in a tenancy by the entirety must be protected to the full extent it is recognized under state law. *Id.* at 1516. And like the court below, it rejected the government's argument that, by operation of a federal common law rule, the tenancy by the entirety should be automatically transformed into a tenancy in common. As a consequence, the Eleventh Circuit held that the United States was not then entitled to a judgment of forfeiture.

In a significant footnote, however, the Eleventh Circuit preserved the possibility that the United States might "execute or levy on its interest should the entirety estate be altered by changes in circumstances or by court order," and it "[did] not rule out the possibility that if the United States filed a *lis pendens* against the property, the government might acquire in a later forfeiture proceeding [the criminal offender's] interest in the property should he divorce his spouse, should [she] predecease him, or should their interests be transmuted into some divisible form by their actions or by law." 894 F.2d at 1516-1517 n. 6. The Sixth Circuit in this case discussed this footnote in explaining why its reasoning was not inconsistent with that of the Eleventh Circuit in *One Single Family Residence*. See Pet. App. A32-A35.⁴

⁴ The court below also stated: "The distinguishing feature in the case before the Eleventh Circuit is that the real property in question had not been sold, and therefore whatever future interest the Government might have in the property would be protected by the filing of a *lis pendens*. [H]ere, however, the real property has been converted to a fund of money which could easily be dissipated. Therefore, it becomes necessary in this case to hold the money in escrow, establish-

As it happens, because petitioner is now divorced from Mitchell Marks, the proceeds of the sale of the Leroy Lane property are now held in a tenancy in common. There accordingly is no impediment to the forfeiture of Mr. Marks' interest to the United States and division of the proceeds between petitioner and the United States. This is precisely the situation contemplated by the footnote in *One Single Family Residence*. Although the mechanics by which the Sixth and Eleventh Circuits have suggested that the respective interests of the United States and the innocent spouse may be accommodated and protected might differ somewhat, the practical effect of their approaches is the same. Review by this Court therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ing in effect a lis pendens in order to protect the Government's interests in anticipation of the occurrence of some event which may result in the vesting of the Government's interest in the proceeds of the property." Pet. App. A34-A35.